THE LAW OF PRIVACY.

BY ELBRIDGE L. ADAMS.

HAS one the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals or newspapers? This was the interesting question which recently came before the New York Court of Appeals.

The decision, by a closely divided court, that, in the existing state of the law, there is no such right, as a legal and actionable right, has, curiously enough, received the disapproval of many newspapers, which, if a contrary conclusion had been reached, would be liable to some one for nearly every issue published. It has likewise excited some surprise in the minds of many persons who had thought that equity is nothing more nor less than the power possessed by judges, and even the duty resting upon them, to decide every case according to a high standard of morality and abstract right.

In view of the widespread interest which the case has attracted, it may be worth while to examine the grounds of the decision, and to discover, if may be, some remedy for what is undoubtedly a growing disregard for the rights of privacy.

The case before the Court of Appeals was this: A lithographic company had printed, and a milling company had circulated as an advertisement of its flour, some prints upon which appeared the likeness of a young woman, above which were the words "Flour of the Family," and below, the name and address of the milling company. A young woman claiming to be the original of the portrait brought suit against both the maker and user of the advertising matter, claiming that she had been greatly humiliated by the

scoffs and jeers of persons who had recognized her face and picture on the advertisement, and that she had been made sick and had been put to the expense of employing a physician, by reason of which she had suffered damage. She prayed to be compensated in damages and for an injunction restraining the further circulation of the picture.

Her complaint contained none of the usual averments of an action for libel, namely, a malicious or false publication, and defamation of character or reputation; nor did it allege that the picture had been obtained through a breach of contract. The relief sought was grounded solely upon the proposition that the circulation of the advertisement, without the complainant's consent, constituted an invasion of her right of privacy.

In reaching the conclusion that her complaint stated no cause of action known to the law, the court observed:

"While most persons would much prefer to have a good likeness of themselves appear in a responsible periodical or leading newspaper rather than upon an advertising card or sheet, the doctrine which the courts are asked to create for this case would apply as well to the one publication as to the other; for the principle which a court of equity is asked to assert in support of a recovery in this action is, that the right of privacy exists and is enforcible in equity, and that the publication of that which purports to be the portrait of another person, even if obtained upon the street by an impertinent individual with a camera, will be restrained in equity on the ground that an individual has a right to prevent his features from becoming known to those outside of his circle of friends and acquaintances. If such a principle be incorporated into the body of the law through the instrumentality of a court of equity, the attempt logically to apply the principle will necessarily result not only in a vast amount of litigation, but in litigation bordering upon the absurd; for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness, but must necessarily embrace as well the publication of a word-picture, a comment upon one's looks, conduct, domestic relations or habits. And were the right of privacy once legally asserted, it would be necessarily held to include the same things if spoken instead of printed, for one, as well as the other, invades the right to be absolutely let alone. An insult would certainly be in violation of such a right, and with many persons would more seriously wound the feelings than would the publication of their picture. And so we might add to the list of things that are spoken and done day by day which seriously offend the sensibilities of good people to which the principle which the plaintiff seeks to have imbedded in the doctrine of the law would seem to apply."

The court then proceeded to examine into the power of a court of equity to decide cases, not falling within any of the recognized principles of the law, according to natural justice.

In the formative period of Chancery jurisdiction in England, the judges, who were bishops and statesmen unlearned in the law, delivered their judgments without regard to principles or precedents. Every decision was, of necessity, an innovation to a greater or less extent upon the existing rules of the common law. These pioneers in the work of building up a new and less rigorous system of jurisprudence, appealed to, and were governed by, the eternal principles of absolute right, and were even guided in their judgments by their own individual consciences. It was this departure from certain rules and principles that provoked the sarcastic witticism of Selden in his "Table Talk":

"Equity is a roguish thing. For law we have a measure and know what to trust to. Equity is according to the conscience of him that is chancellor; and as that is larger or narrower, so is equity. 'Tis all one as if they should make his foot the standard for the measure we call a chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third, an indifferent foot. 'Tis the same thing with the chancellor's conscience."

After an orderly system of equitable principles, doctrines and rules began to be developed out of the increasing mass of precedents, this theory of a personal conscience was abandoned, and "the conscience came to be regarded, and has so continued to be regarded to the present day, as a metaphorical term, designating the common standard of civil right and expediency combined, based upon general principles and limited by established doctrines, by which the conduct and rights of suitors are tested." A court of equity, at the present time, cannot, therefore, by avowing that there is a wrong, but no remedy known to the law, create a remedy in violation of the law, or even without the authority of the law. It must act, not only upon established principles, but through established channels.

It has always been a principle of equity jurisprudence that obligations and corresponding rights which are purely moral do not come within the jurisdiction of the courts. The civil law is a business system dealing with tangible property and contractual rights, and does not undertake to redress psychological injuries. There are many matters of natural justice which cannot be en-

forced in any court, either because of the difficulty of framing general rules to meet them, or from the doubtful policy of attempting to give legal sanction to duties of imperfect obligation, such as charity, gratitude, and kindness.

The Court of Appeals could not, therefore, without an assumption of jurisdiction unwarranted by the history of jurisprudence, take cognizance of a complaint which was based wholly upon an injury to the feelings. Nor was it able to find any precedent for a decision in accordance with the plaintiff's contention.

There have been several cases, both in England and in this country, in which the "right of privacy" has received attention from the courts. The earliest of these was the case of Prince Albert, consort of the late Queen Victoria, who, as a citizen of the realm, brought an action to restrain the exhibition of etchings which he and the Queen had made for their own amusement, but which, through the turpitude of a workman employed to strike off some copies for presentation to their friends, had come into the hands of a London art-dealer, who proposed to exhibit them and had published a descriptive catalogue of them. One of the grounds assigned for the injunction desired was the invasion of the Prince's privacy, but the decision of the court was based upon the infringement of his property rights in his own artistic creations, and also upon the breach of trust by the workman in retaining impressions of the etchings for himself.

In this country, the attempt to engraft the right of privacy upon the body of the law goes back to the year 1890. An article in "Scribner's Magazine" for July of that year, by the late Mr. E. L. Godkin, entitled "The Rights of a Citizen—to his Reputation," called attention to the growing license of the press, and particularly to its insidious invasion of the sanctity of private and domestic life, and suggested the need of some extension of the law of libel. Inspired by this suggestion, the "Harvard Law Review," later in the same year, gave prominence to a cleverly conceived and written article, in which it was sought to build up, upon the analogy of the cases involving literary property, the principle of an inviolate personality, or the right to be let alone. This essay in theoretical jurisprudence in turn suggested the celebrated case which arose in the courts of New York in 1892, and in which the family of Mrs. Schuyler, formerly Miss Mary M. Hamilton, and conspicuous in her life-time for her philanthropic

work, attempted to prevent the exhibition at the Columbian Exposition of a statue of Mrs. Schuyler, intended to typify "Woman as a Philanthropist," alongside of a companion piece, a statue of Miss Susan B. Anthony, intended to represent "Woman as a Reformer." They asserted that the projected memorial was disagreeable and obnoxious to them, because it would have been so to Mrs. Schuyler, if living; and that it was annoying to have her memory associated with principles which Miss Anthony typified, and of which Mrs. Schuyler did not approve. They succeeded in the courts of original and intermediate appellate jurisdiction upon the theory advanced by the "Harvard Law Review" article; but the court of last resort denied their right to maintain the action, upon the ground that they, as relations, did not represent any right of privacy which Mrs. Schuyler possessed in her lifetime, and that whatever her right had been in that respect, it died with her. The court was also inclined to the view that the grievance was too trivial to excite any real mental distress or injury; but it carefully avoided any definite decision of the question whether there is such a legal right as the right of privacy.

The question next came up for adjudication in the Supreme Court of Michigan, which found no difficulty in deciding that a widow could not enjoin a manufacturer of cigars from using the name and portrait of her late husband, to designate a brand of cigars. The court said:

"Society may be depended upon to make proper allowances in such cases; and although each individual member may, in his own case, suffer a feeling of humiliation when his own name, or that of some beloved or respected friend, is thus used, he will, usually, in the case of another, regard it as a trifle. So long as such use does not amount to a libel, we are of the opinion that the individual would himself be remediless were he alive, and the same is true of his friends who survive. . . . This law of privacy seems to have gained a foothold at one time in the history of our jurisprudence—not by that name, it is true, but in effect. It is evidenced by the old maxim 'the greater the truth, the greater the libel'; and the result has been the emphatic expression of public disapproval, by the emancipation of the press and the establishment of freedom of speech, and the abolition, in most of the States, of the maxim quoted, by constitutional provisions. The limitation upon the exercise of these rights is the law of slander and libel, whereby the publication of an untruth that can be shown to be injurious, not alone to the feelings, but to the reputation, is actionable. Should it be thought that it is a hard rule that is applied in this case,

it is only necessary to call attention to the fact that a ready remedy is to be found in legislation."

In another case, the widow of Corliss, the inventor, brought suit to restrain the publication of his biography and picture, upon the distinct ground that it was an invasion of her right of privacy. The court denied the relief sought, saying:

"Freedom of speech and of the press is secured by the Constitution of the United States and the Constitutions of most of the States. This constitutional privilege implies a right freely to utter and publish whatever the citizen may please, and to be protected from any responsibility for so doing, except so far as such publication, by reason of its blasphemy, obscenity, or scandalous character, may be a public offence, or by its falsehood or malice may injuriously affect the standing, reputation, or pecuniary interests of individuals. In other words, under our laws one can speak and publish what he desires, provided he commit no offence against public morals or private reputation."

The English court of appeals has lately affirmed, without a dissenting vote, a judgment which denied an injunction to a London physician, of whom it had been published, with substantial truth, but without authority, that he had been prescribing the defendant's patent gout cure, and using it himself with good results.

It will thus be seen that when the question, whether the so-called right of privacy exists as a part of the unwritten or common law of the land, came before the New York court of last resort, there were no well-established precedents pointing the way to the affirmative of that proposition, and the court was therefore confronted with the necessity of making new law, or turning the plaintiff out of court. In exercising the latter alternative, the court was careful to say that it did not mean to hold that in every case where a picture is circulated against the will of the original, he is without a remedy, even under the existing law. The Penal Code of New York, and of many other States, punishes a malicious publication, by picture, effigy or sign, which exposes a person to public contempt, ridicule or obloquy, as a libel.

"There are many articles, especially of medicine, whose character is such that using the picture of a person, particularly that of a woman, in connection with the advertisement of those articles, might justly be found by a jury to cast ridicule or obloquy on the person whose picture is thus published. The manner or posture in which the person is portrayed might readily have a like effect. In such cases, both a civil action and a criminal prosecution could be maintained."

The court also pointed out—and this, we take it, is the conclusion of the whole matter—that the legislature might very well interfere and arbitrarily provide that no one shall be permitted, for his own selfish purposes, to use the picture or name of another for advertising purposes without his consent.

Here, then, we have judicial recognition of the necessity for positive legislation to meet a condition of modern society which is becoming intolerable; and, if we may interpret the comments of the newspaper press upon the decision, as faithfully reflecting public opinion, there is a widespread popular desire for relief. But relief will not be obtained if legislation is directed against advertisers alone; it must be broad enough to prevent journalistic, and even so-called literary, invasions of privacy.

The subject thus opened up is, we take it, really an extension of the law of libel. Modern society, goaded by the excesses of a sensational and scandal-loving press, has become sensitive. It is no longer satisfied with the reparation of its material wrongs—damage to reputation; it demands protection against spiritual wrongs —damage to feelings. This sentiment has already found expression in a statute enacted by the legislature of New York in 1900, which makes it a misdemeanor to publish any private letter, telegram or papers found on the person, or among the effects, of one who has committed suicide, or who has been found dead, with certain exceptions in the interest of the detection of crime.

In determining the scope and limitations of any legislation directed to the safe-guarding of the right to privacy, it will be well to avoid the extreme of sensitiveness exhibited by the French, who have had a law since 1868 which punishes the publication by a periodical of "any fact of private life." Under this law a man can have satisfaction if a newspaper print any gossip about him, even though it be harmless gossip.

The distinction between public and private characters must also be observed, difficult as it may be to draw the line. The idea which has been advanced by several judges, that, while a private character should be protected against the publication of his portrait, the case is different with a statesman, an author, an artist or an inventor, who asks for and desires public recognition, cannot be literally entertained. The right of privacy is not conditioned upon mediocrity. It would be more accurate to say that, when one seeks for and obtains public office, he must submit that so

much of his history and life as bears on his fitness for the position, shall be made a matter of public record; or that, when one publishes a book or exhibits a picture to the judgment of the public, the public has a right to discuss and criticise his literary or artistic career. Certainly, a modest and retiring woman who has painted a picture which is hung on the line at the Academy, does not thereby dedicate her private life to the public.

It might well be that one should be deemed to have dedicated to the public the right to use his portrait, or to comment on his private life, by his own voluntary publication; just as one may dedicate an unpublished book or drama by printing it or allowing it to be produced without first obtaining a copyright.

It is apparent, upon the most casual examination of the subject, that it will be difficult to draw up an act which will not give rise to many inconsistencies. The attempt which was made three or four years ago in the New York legislature to pass what was known as the "anti-cartoon bill" failed, because the newspapers pointed out the numerous flaws in it. It was shown, for instance, that, while the bill would prevent a New York periodical from caricaturing a citizen of that State, it could not prevent Boston and Chicago papers from lampooning him as much as they chose.

The State of California, however, which is quite as progressive in the science of law-making as any State in the Union, has succeeded in getting upon its statute books a law which is designed to prevent the unauthorized publication both of portraits and caricatures. The law, which was enacted in 1899, as an extension of the law of criminal libel, may be reproduced here because of its novelty. It is as follows:

"It shall be unlawful to publish in any newspaper, handbill, poster, book, or serial publication, or supplement thereto, the portrait of any living person, a resident of California, other than that of a person holding a public office in this State, without the written consent of such person first had and obtained; provided, that it shall be lawful to publish the portrait of a person convicted of a crime. It shall likewise be unlawful to publish in any newspaper, handbill, poster, book or serial publication or supplement thereto, any caricature of any person residing in this State, which caricature will in any manner reflect upon the honor, integrity, manhood, virtue, reputation or business or political motives of the person so caricatured, or which tends to expose the person so caricatured to public hatred, ridicule or contempt.

"A violation of this section shall be a misdemeanor, and shall be punished by a fine of not less than one hundred dollars, nor more than five

hundred dollars, or by imprisonment in the county jail for not less than one month nor more than six months, or by both such fine and imprisonment.

"All persons concerned in said publication, either as owner or manager, editor or publisher, or engraver, are each liable for said publication. Actions for the violation of this section shall be tried in the county where such newspaper, handbill, poster, book or serial publication, or supplement is printed or has its publication office, or in the county where the person whose portrait or caricature is published resides at the time of the alleged publication."

The second section requires that every article, statement or editorial contained in any newspaper or other printed publication, published in California, which tends to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or to publish the natural or alleged defects, of one who is alive, and thereby expose him or her to public contempt, hatred, or ridicule, must be supplemented by the true name of the writer of such article, statement or editorial, signed or printed at the end thereof, subject to a penalty of one thousand dollars for each offence, to be recovered in a civil action.

A critical examination of this statute discloses several defects in it. In the first place, it is obvious that it will not, and probably was not designed to, afford protection against the publication of one's private and domestic affairs. It would not, for instance, prevent a newspaper from printing all the prurient details of a family scandal or a divorce suit.

The exception of persons holding public office should be broadened so as to include candidates for public office; and there should be a proviso that persons who have themselves voluntarily dedicated their features to the public by some act of publication are not within the protection of the act. It may well be doubted, too, if the phrase "which caricature will in any manner reflect upon . . . . the political motives of the person so caricatured," is not too vague to be effective.

With these exceptions, however, the act seems to be a fair attempt to remedy the evil aimed at, and will afford a good basis for enterprising legislators in other States to work on.

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